United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 15, 1998

TO : Rochelle Kentov, Regional Director
Region 12

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Kendall Health Care Properties d/b/a The Palace at Kendall and Home Nurse Corp.
Case 12-CA-19278

177-2414
177-2484-2500
177-2484-5000
625-4417-1400

This Section 8(a)(1) and (3) case was submitted for advice as to whether private duty nursing assistants are statutory employees of the Respondents or statutorily exempted independent contractors or domestic servants.

FACTS

The Palace at Kendall ("the Palace") is a combined nursing home and assisted living facility for elderly residents located in Miami, Florida. Principals of the Palace recently founded Respondent Home Nurse Corp. ("Home Nurse") as an agency which refers private duty certified nursing assistants ("CNAs") for a fee to residents of the Palace in order to assist them with their daily needs, as required. The Palace also directly employs other CNAs to care for residents who do not need private duty CNAs and to cover for periods of time when a resident's private duty CNA is not on site. The Regional Director has concluded that the Palace and Home Nurse are a single employer.

In January 1998,[1] CNAs began an organizing drive under the auspices of Charging Party Service Employees International Union, Local 1115 ("the Union") for representation of a unit of approximately 113 CNAs and dietary, maintenance and housekeeping employees. The Region has concluded that within four weeks after the campaign started, the Employer effectively discharged five CNAs because of their Union activities; threatened employees with discharge and the loss of benefits; solicited grievances in response to employees' protected,

[1] All dates are in 1998 unless specified otherwise.

concerted activities; and promulgated and enforced a new work rule prohibiting solicitation in the workplace. Of the five discharged CNAs, two were employed directly by the Palace, two others were employed solely as private duty nursing assistants retained and paid directly by the elderly residents of the Palace for whom they cared, and one worked both as a Palace CNA and as a private duty CNA. The instant memorandum addresses whether these private duty CNAs are statutory employees of the Palace accorded protection under the Act.

As set forth above, some residents require the assistance of CNAs to provide them with additional care. The Palace determines whether residents require 12 or 24-hour assistance, or none at all. In such cases, residents (or, most likely, their families) pay the CNAs directly, not through the Employer. All private duty CNAs receive the same wage rate -- $75 for 12 hours -- set unilaterally by the Palace.

In addition, the Palace plays a significant role in the CNA's working life; the case of Debbion Menzie, one of the alleged discriminatees herein, is illustrative. Arlene Schweitzer, formerly a manager employed by the Palace, conducted a screening interview with Menzie for a position as a private duty CNA for one of the residents of the Palace.[2] Satisfied with Menzie's credentials, certification, training and experience, Schweitzer arranged for a second interview with the resident's family. Menzie did not discuss wages or working hours with the family during the interview because Schweitzer had already notified them that the resident required care 12 hours per day and that Menzie would receive a daily wage of $75. The family hired Menzie and paid her straight wages without fringe benefits and without deducting payroll taxes from her paycheck. The family paid the Palace separately for the resident's primary care.

While at work, Menzie would contact Schweitzer about any problems she might encounter. She and the other private duty CNAs occasionally met with Palace officials to resolve any complaints they had about working conditions.

---

[2] Menzie was referred to Schweitzer by Home Nurse's predecessor.

The Palace directed Menzie to contact Home Nurse to arrange for a replacement if she was unable to work her shift. The Palace further required Menzie to stay with her resident throughout the day and prohibited her from taking a break or leaving the facility for lunch. The Palace also enforced a dress code, consisting of black pants with a beige shirt, among private duty CNAs.

Menzie was not responsible for purchasing any equipment. The Palace provided linens, furniture, gloves, cleaning services and meals for the residents. The resident's family provided the rest of the materials she needed throughout the day, such as diapers, cleaners, a wheelchair and a walker. During the time when private duty CNAs care for residents, the Palace is relieved of that responsibility. However, after private duty CNAs leave the facility at the end of their shift, CNAs employed directly by the Palace continue caring for the residents just as private CNAs would have done had they remained at work. Although Home Nurse allowed Menzie to continue working with her resident at no additional cost after it commenced operations and replaced a predecessor referral agency, Home Nurse notified all private duty CNAs that they would be charged a referral fee equaling one week's pay should they subsequently change residents or take on new work.

As set forth above, the Palace effectively discharged Menzie and another private duty CNA involved in the Union organizing drive. That is to say, the Palace barred them from entering the facility, thus effectively ending their working relationships with the residents who lived there. The Palace took this action unilaterally, without seeking the approval of -- or even notifying -- the residents or their families.[3]

[3] The family of a resident attended by one of the discharged private duty CNAs vehemently disputed the Palace's action against the CNA and ultimately removed the resident from the facility.

ACTION

We conclude that private duty CNAs are statutory employees of the Palace.[4]

Section 2(3) of the Act excludes from the definition of employee "any individual having the status of an independent contractor." In determining whether individuals are employees or independent contractors, the Board applies the common law of agency, including the "right-of-control" test:

> Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.[5]

Among the significant factors are the following:

> (1) whether individuals perform functions that are an essential part of the Company's normal operation or operate an independent business; (2) whether they have a permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company's name with assistance and guidance from the Company's personnel and ordinarily sell only the Company's products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting procedure prescribed by

---

[4] The Region intends, upon issuance of complaint, to seek an expedited hearing before an ALJ.

[5] News Syndicate Co., 164 NLRB 422, 423-24 (1967).

> the Company; (6) whether particular skills are required for the operations subject to the contract ....[6]

In addition to the elements comprising the "right of control" test, the Board looks to the extent of the "entrepreneurial risk" undertaken by the parties performing the service. Thus, the Board determines "whether they have a proprietary interest in the work in which they are engaged" and "whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss."[7]

Applying these principles, we conclude that the Palace was the CNAs' employer because it retained the right to control the manner and means by which private duty CNAs performed their duties.[8] The Palace unilaterally set CNAs'

---

[6] Standard Oil Co., 230 NLRB 967, 968 (1977).

[7] Ibid.

[8] It is not necessary to address whether the residents and/or their families are employers of private duty CNAs since no party made such a contention either in an unfair labor practice charge or during the investigation. Nonetheless, even if residents and/or their families were to constitute joint employers with the Palace because of the role they play in the hiring and firing of CNAs, we agree with the Region that imposing liability on the families for the Palace's unlawful Section 8(a)(1) and (3) conduct -- which the Palace effectuated unilaterally and without notice to or approval by the residents' families -- is inappropriate. Thus, there is no evidence that the families "knew or should have known that the other employer acted against the employee[s] for unlawful reasons ...." Capitol EMI Music, 311 NLRB 997, 1000 (1993), enf'd 146 LRRM 2448 (4th Cir. 1994) (joint employer not liable for partner's unfair labor practices where latter did not tell former that it effectively discharged discriminatee because of his union activity). See also Computer Associates International, 324 NLRB No. 43, slip op. at 1 n.4 (August 19, 1997) ("innocent party" with no knowledge of terminations or Section 8(a)(1) statements not liable for other joint employer's unfair labor practices); America's

pay and hours[9] and its managers directed them in their work. CNAs were expected to adhere to a variety of work rules ranging from call-in procedures to break policies to a standard dress code.[10] Moreover, the functions Menzie and other private duty CNAs performed were integral to and virtually coextensive with the functions normally performed by the Respondent's employees. In fact, CNAs employed directly by the Palace substituted for private duty CNAs at the end of their shift.

Furthermore, private duty CNAs have neither a proprietary interest in their work nor the opportunity to make decisions involving risks that could result in profit or loss. The Respondent unilaterally set their pay, which the CNAs have no way of increasing. The Palace determines the level of care appropriate for each resident, which effectively deprives CNAs of the ability to adjust their hours. Moreover, private duty CNAs have no expenses inherent to the job; the Employer and the residents' families provide them with all the supplies and equipment they require.[11] In sum, private duty CNAs "bear slight

_____

Best Quality Coatings Corp., 313 NLRB 470, 471 (1993), enf'd 44 F.3d 516 (7th Cir. 1995), cert. den. 115 S. Ct. 2609 (1995) (joint employer not liable for unlawful layoffs and delayed recalls of employees, where employer neither knew nor should have known of unfair labor practices committed by other joint employer).

[9] See People Care, Inc., 311 NLRB 1075, 1077 (1993) (certified home health aides were employees where, inter alia, employer unilaterally set their wages); Rosemount Center, 248 NLRB 1322, 1324 (1980) (day care providers were statutory employees in part because their non-negotiable fees were determined by the employer); Adderly Industries, 322 NLRB 1016, 1023 (1997) (cable television installers were employees, based in part on employer's "almost unfettered discretion" in determining employees' pay).

[10] See People Care, Inc., 311 NLRB at 1077 (certified home health aides held to be employees had to abide by a variety of work rules set forth in employer's personnel manual).

[11] Compare People Care, 311 NLRB at 1077(employee/home health aides assume no costs of patient care, do not

resemblance to the independent businessmen whose earnings are controlled by self-determined policies, personal investment and expenditures, securing business, and market conditions."[12]

We further conclude that the employees at issue herein are not exempt from statutory protection under Section 2(3) as individuals employed "in the domestic service of any family or person at his home." In concluding in Ankh Services[13] that in-home health service workers were statutory employees, the Board expressly limited this exclusion to "those individuals whose employment falls within the commonly accepted meaning of the term 'domestic servant.'" The Board explained that its "focus is on the principals to whom the employer-employee relationship *in fact* runs and not merely to the undisputedly 'domestic' nature of the services rendered."[14] As set forth above, the

---

purchase equipment or supplies and never work out of their own home), with Cardinal McCloskey Services, 298 NLRB 434 (1990) (day care providers were independent contractors where, inter alia, they assumed entrepreneurial risk by working out of their own homes, thereby assuming business-related costs such as utilities payments as well as risk of damage to their facilities). The Board's decision in Cardinal McCloskey is further distinguishable from the instant case inasmuch as most of the factors therein which were indicative of employee status were a result of governmental regulations rather than the employer's inherent right to control. Id. at 437.

[12] People Care, 311 NLRB at 1077 (quoting The News-Journal Company, 227 NLRB 568, 570 (1976)). The fact that no deductions were made from the CNAs' paychecks, standing alone, is not dispositive of their status, where, as here, it is outweighed by other factors. See Gary Enterprises, 300 NLRB 1111, 1112 n.3 (1990), enf'd mem. 958 F.2d 368 (4th Cir. 1992) (given totality of evidence, individual held to be employee even though no deductions taken from employee's paycheck).

[13] 243 NLRB 478, 480 (1979).

[14] Ibid (emphasis in original).

CNA's working conditions amply demonstrate that their services run *in fact* to the Palace as their employer. Although some of their duties, such as feeding and clothing, might be shared with domestic servants (as did the aides' duties in Ankh Services), it would be as unwarranted here at it was in Ankh Services to conclude that the CNAs thereby should be classified as maids, cooks, or other domestic servants rather than as health care workers.[15]

In sum, we conclude that the private duty CNAs are statutory employees.[16]

B.J.K.

[15] It is immaterial that CNAs herein work exclusively with a single resident, as opposed to the home health care workers in Ankh Services who assisted a number of individuals each day. The CNAs' exclusive service to one resident neither meaningfully distinguishes their daily activities from those of the health care workers in Ankh Services, nor does it negate their direct control by, and performance of duties otherwise done by CNA's directly employed by, the Palace.

[16] In light of this conclusion, we need not address the submitted issue concerning the appropriate remedy if the CNAs are found not to be employees.